No. 82-1330

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

BILL ALLAIN, Attorney General
State of Mississippi
WILLIAM S. BOYD, III
(Counsel of Record)
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Attorneys for Petitioners

F. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that respondent Barry Joe Roberts, had a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Codes and Statutes

No. 82-1330

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

VS.

BARRY JOE ROBERTS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix to the Petition for Certiorari, pp. A1 to A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in said appendix, pp. A7 through A13.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982 (Petition for Certiorari, p. A7). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Miss. Code Anno. §§ 63-3-1201, 97-3-47 and 99-35-1 *et seq.* (1972) are the State's laws involved in this cause.

U. S. Constitution Amendment V provides in part that:

> . . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

U. S. Constitution Amendment XIV, Section One, provides in part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

STATEMENT OF THE CASE

A. Summary of the Facts

The facts supporting the verdict of the jury herein as found by the Mississippi Supreme Court can best be summarized as showing that on August 6, 1977, at approximately 7:00 p.m., Mrs. Mary Ella Bonner was driving her pickup truck in a southerly direction on Mississippi State Highway 35 between Charleston and Batesville. Testimony showed that two (2) other persons were riding in the cab of the truck with her and that five (5) children were riding in the bed of the truck. Respondent was driving an automobile in a northerly direction on said highway and, as the two (2) vehicles approached

each other, respondent's automobile ran off the east side of the highway, came back upon it and collided with the Bonner truck in the southbound lane of travel. Brenda Gail Bonner, ten-year-old daughter of Mrs. Mary Ella Bonner, sustained a broken neck in the collision and expired at the same period.

Mrs. Louise Goad, who operated a store which dispensed alcoholic beverages, testified that, at approximately 5:30 p.m. on the date of the accident, respondent purchased a beer for himself and a companion and also a six-pack of beer to carry with them. She observed that respondent had been drinking excessively at the time and left the establishment at a high rate of speed.

Mr. E. J. Dunnigan, a former law enforcement officer, saw respondent at approximately 6:45 p.m. on said day, driving north on highway 35 at a high rate of speed, which he estimated to be approximately 90 miles per hour. He went to the scene of the accident, observed the position of the cars and debris, and that respondent's eyes were red. However, he did not testify that respondent was intoxicated.

Reverend W. T. Barkley and Margaret Barkley, his wife, were proceeding south on highway 35 directly behind Mrs. Bonner's truck before, and at the time of, the collision. He said that respondent's car ran off the highway, turned sideways, came back upon it, turned sideways again, and collided with the Bonner truck in the southbound lane. He walked over to respondent's car and indicated that "it smell like it was a beer truck wreck rather than a car." Mrs. Barkley corroborated her husband as to the details of the collision.

Mrs. Mary Ella Bonner testified that, as she was driving her truck south upon the highway, she saw re-

spondent's car approaching at an extremely high rate of speed, the car left the highway, swerved back upon it, went into a spin, and collided with her truck in the southbound lane of travel.

Trooper Thomas McLeod, of the Mississippi State Highway Patrol went to the scene for the purpose of investigating the collision. He detected the odor of alcohol on respondent, who was unstable in his walking, was glassy-eyed and appeared to be under the influence of alcohol. Officer McLeod ask him what he was drinking, and respondent replied, "well, I have been drinking beer all afternoon." McLeod was of the opinion that respondent's ability to operate a motor vehicle was impaired as a result of intoxication.

Respondent testified that he leaned over to pick up a tape for his tape player, which had fallen onto the floorboard, and, in doing so, lost control of the vehicle, which resulted in the collision.

B. Procedural History

Shortly after the collision, Trooper Thomas McLeod of the Mississippi Highway Patrol cited respondent for violating Miss. Code Anno. § 63-1-57 (1972), driving while license revoked, Miss. Code Anno. § 63-11-33 (1972), driving under the influence of intoxicating liquor, Miss. Code Anno. § 63-3-1201 (1972), reckless driving, and Miss. Code Anno. § 63-3-601 (1972), driving a vehicle on the wrong side of the road. On August 13, 1977, respondent appeared before the Honorable Sandra B. Johnson, Justice Court Judge for District One of Tallahatchie County and was found guilty of and sentenced on all four charges. On that same date respondent filed notice of and perfected appeal to the Circuit Court of Tallahatchie County pursuant to Miss. Code Anno. § 99-35-1 (1972).

On December 9, 1977, before the misdemeanor charges were heard *de novo* in the Circuit Court, respondent was indicted by the Tallahatchie County Grand Jury for manslaughter by culpable negligence.[1] In particular the indictment charged that on or about the 6th day of August, 1977, that Barry Joe Roberts did "unlawfully, willfully, and feloniously kill and slay one Brenda Bonner, a human being, by culpable negligence . . . ." (A 1). On December 14, 1977, respondent was arraigned on the charge of manslaughter. On that date the Court consolidated the misdemeanor charges with the felony charge and set the matter for trial.

On Monday, May 28, 1978, the matter was called for trial. A jury was impaneled, and evidence detailing the aforesaid facts presented.

Just prior to the close of the State's case the following colloquy occurred:

> BY MR. WILLIAMS: For the record, as the Court and Mr. Kellum may recall, in the preliminaries of this trial that's in progress, the Court ruled that Cause Numbers 4266, 4267, 4268, and 4269—
>
> BY THE COURT: Wait just a minute. Did you waive the presence of your client here in chambers for this purpose?

---

1. Inasmuch as this case involves misdemeanor charges filed in the Justice of the Peace Court and a felony charge filed in the Circuit Court, it is important to note in light of the District Court's finding of vindictiveness in light of *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974), that in Mississippi under Miss. Code Anno. § 19-23-11 (1980) the County Prosecuting Attorney is charged with all criminal prosecutions before the various justice court judges and the county court, if the county has elected to provide for such, and under Miss. Code Anno. § 25-31-11 (1980) the District Attorney is to prosecute all criminal matters before the various grand juries and in the circuit courts. Practically speaking, county prosecuting attorneys handle all misdemeanor cases, and district attorneys handle all felony cases.

BY MR. KELLUM: Yes, sir.

BY THE COURT: Let the record so reflect. Go.

BY MR. WILLIAMS: Those four cause numbers which I just mentioned were appeals from misdemeanor convictions in JP Court, Beat One. The Court may recall it ruled for the purpose of trial that these matters would be consolidated with 4265, which is the case in progress. The State would now move the Court for leave to sever from Cause 4265 Cause Numbers 4266, 4267, 4268 and 4269, and for further authority to remand those four cause numbers to the file.

BY THE COURT: Does the Defendant interpose any objection to that?

BY MR. KELLUM: No objection.

BY THE COURT: Let the record so reflect.

(A95-96)[2]

The respondent then proceeded to present his witnesses and rested.

At the close of the evidence the Court in pertinent part instructed the jury on the substantive issue thusly:

S-1

The Defendant, BARRY JOE ROBERTS, has been charged by the Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

---

2. The Court of Appeals found that this was the equivalent to nolle prosequi.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

a) The deceased, BRENDA BONNER, was a living person; and

b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

(A98-99)

S-2

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

(A99)

D-1

The Court instructs the jury that "culpable negligence" as used in this case is negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt and if, from the evidence or lack of evidence in this case you entertain a reasonable doubt as to the defendant's guilt (as to culpable negligence) then it is your sworn duty to find him not guilty.

(A99)[3]

On that same date the jury unanimously returned a verdict of guilty as charged, and on June 12, 1978, respondent was sentenced to serve a term of twenty (20) years with the Mississippi Department of Corrections. An appeal was taken to the Mississippi Supreme Court which affirmed the conviction on December 5, 1979. *Roberts v. State*, 379 So.2d 514 (Miss. 1979).

Respondent raised for the first time the question of double jeopardy in an Application to the Mississippi Supreme Court for Leave to File a Petition for a Writ of Error Coram Nobis on or about November 3, 1980. The application was denied without opinion, and the respondent on March 13, 1981, proceeded into the Federal arena.

On or about March 13, 1981, respondent filed a Petition for Writ of Habeas Corpus in the United States Dis-

---

3. Both the Supreme Court of Mississippi and this Court have repeatedly held that instructions must be read and considered as a whole. *Cowan v. State*, 399 So.2d 1346 (Miss. 1981); *Hutchinson v. State*, 391 So.2d 637 (Miss. 1980); *Henderson v. Kibbe*, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977).

trict Court, Northern District of Mississippi. The grounds assigned for relief were:

1. The trial court erred in permitting the petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous justice court charges for which the petitioner had been tried, convicted, and sentenced.
2. The trial court erred in vacating its order denying petitioner a special venire and later during the trial declaring that a special venire had in fact been given and petitioner's trial attorney was negligent in not objecting to same.
3. The trial court erred in permitting the State to consolidate the misdemeanor appeals and to receive evidence relating to same during trial of the related felony count and petitioner's trial attorney was grossly negligent in not objecting to same.
4. The legal representation of the petitioner at the trial level and at the initial appellate submission was grossly incompetent and prejudicially negligent and entitles the petitioner to a new trial.

On April 20, 1981, petitioners filed their Answer and Return denying that respondent was entitled to relief.

On November 3, 1981, the Magistrate filed his Report and Recommendation recommending that the writ issue. On December 8, 1981, petitioners filed objections to the Magistrate's Report and Recommendation and on January 18, 1982, Honorable L. T. Senter, Jr., Chief United States District Judge for the Northern District of Mississippi, filed his Order adopting the Magistrate's Report and Recommendation and granting respondent habeas corpus relief.

The Court of Appeals affirmed the District Court's judgment on November 16, 1982.

SUMMARY OF THE ARGUMENT

This matter is before the Court on a grant of certiorari to the United States Court of Appeals for the Fifth Circuit. The principal issue presented for consideration focuses upon the question of whether the indictment and prosecution of the respondent for manslaughter by culpable negligence subsequent to a conviction of reckless driving in justice of the peace court and an appeal with a right to a trial *de novo* raises a substantial claim of double jeopardy.

The arguments presented by the petitioners herein focus upon the office of the right to a trial *de novo* on appeal from a judgment of conviction in a justice court. Specifically, petitioners argue that there is a lack of mutuality between the elements of the offenses of manslaughter by culpable negligence under Miss. Code Anno. § 97-3-47 (1972) and reckless driving under Miss. Code Anno. § 63-3-1201 (1972). The substance of the arguments advanced by petitioners dwells upon the propositions that [1] an appeal with a right to a trial *de novo* voids the previous conviction and the defendant stands before the appellate court as if he had never been convicted [2] an analysis of the offense of reckless driving is predicated upon the manner in which one operates a motor vehicle upon the streets and highways of the State of Mississippi and is in no way dependent upon any resultant injury to persons or property. On the other hand, the crime of manslaughter by culpable negligence not only involves an unlawful homicide but is not restricted as to either instrumentality or location.

Consequently, petitioners submit that the Court of Appeals erred in affirming the grant of habeas, and the case should be reversed and remanded.

ARGUMENT

THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD OF REVIEW WHEN IT HELD THAT ROBERTS HAD A SUBSTANTIAL DOUBLE JEOPARDY CLAIM UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN ILLINOIS v. VITALE, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980)

A. Mississippi Procedure in Appeals of Criminal Convictions in Justice of the Peace Courts

Like the State of Kentucky in *Colten v. Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), Mississippi provides for a trial *de novo* on appeal from a criminal conviction in a justice of the peace court. In *Calhoun v. City of Meridian, Mississippi*, 355 F.2d 209, 211 (5th Cir. 1966), the Court of Appeals cogently outlined the procedure for such appeals.

> This section, 1202, as construed by the courts has little resemblance to conventional appeal statutes. On the filing of the appeal, the appeal supersedes the judgment of the justice of the peace and the case became triable in the circuit court de novo.
>
> The Supreme Court of Mississippi has held that once a defendant in a criminal case elects to take a trial de novo he is powerless to dismiss the new trial and accept the earlier verdict instead. He stands in the circuit court in "the same attitude of a defendant as he did in the court of the Justice of the Peace and as such is impotent to dismiss the case."

> In effect, the Supreme Court of Mississippi has held when an appeal is taken from a justice court, the judgment of the justice court is vacated.
>
> When a cause is removed to the circuit court on appeal from a justice of the peace court, the jurisdiction acquired by the circuit court is not in any proper sense appellate. The circuit court in such cases, has no authority to merely review and affirm or reverse the judgment of the justice of the peace, but the case must be tried anew as if it were originally instituted in the circuit court, with the single exception that written pleadings are not required, and the jurisdiction to consider such cases de novo on appeal and decide them according to the law and evidence, independent of the ruling and judgment of the lower court is original and not appellate. (footnotes omitted)

See: Miss. Code Anno. §§ 99-31-1 *et seq.* (1972).

Although not specifically mentioned in *Calhoun*, a person charged with a misdemeanor violation in justice of the peace court may plead guilty and still obtain a trial *de novo* on appeal. *Niblett v. State*, 75 Miss. 105, 21 So. 799 (1897); *Jenkins v. State*, 96 Miss. 461, 50 So. 495 (1909); *Ball v. State*, 202 Miss. 405, 32 So.2d 195 (1947); *Little v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

Within the context of the question *sub judice*, it is interesting to note that in *Calhoun, supra*, the Court of Appeals held that for purposes under 28 U.S.C. § 1446(c) that petitions for removal after appeals from judgments of justice courts and before *de novo* trials in the appropriate appellate court were timely as filings before trial as contemplated by the statute.

Consequently, the threshold question concerns the effect of a trial *de novo* as it relates to the Double Jeopardy Clause. The answer seems to lie in *Colten, supra.*

While in principal part this Court's decision in *Colten, supra,* appeared to deal with the question of judicial vindictiveness in the context of the Due Process Clause as interpreted in *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), the Court did discuss the application of the Double Jeopardy Clause. In addressing this question the Court emphasized several of the procedural provisions common to both Mississippi and Kentucky. Thus in denying Colten's claim, the Court held:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The Pearce Court rejected the same contention in the context of that case, 395 U.S., at 719-720, 23 L.Ed.2d at 665, 666. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in Pearce, where reversal of the first conviction was for constitutional error. *The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea.* [emphasis added]
>
> *Colten, supra* at 120.

Likewise, a defendant in Mississippi can bypass the inferior court, i.e., justice of the peace court, by pleading guilty and may thereafter erase any consequence thereof by merely appealing to the next higher level court.

The effect, therefore, of a right to a trial *de novo* wipes the slate clean, and a defendant stands in no worse position than he did before initial conviction in the justice court. Consequently, the Double Jeopardy Clause is simply inapplicable.

B. Reckless Driving Is Not Necessarily the "Same Offense" of Manslaughter by Culpable Negligence in Mississippi

To begin our discussion we note from the outset that Mississippi does not have a specific vehicular homicide statute. Instead, those cases like *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980), are prosecuted under Miss. Code Anno. § 97-3-47 (1972) which defines manslaughter in general terms as the "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law . . . ."[4] On the other hand, reckless driving is defined in Miss. Code Anno. § 63-3-1201 (1972) as the driving of "any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property . . . ."

In affirming the grant of the writ the Court of Appeals acknowledged that each of the offenses required proof of an element the other did not. In regard to the offense of reckless driving the Court held:

---

4. The Supreme Court of Mississippi has consistently defined the crime of manslaughter by culpable negligence to mean "negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be negligence so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt." *Moore v. State*, 238 Miss. 103, 117 So.2d 469 (1960), and the cases cited therein.

> To establish a violation of the reckless driving statute, one element not required to prove manslaughter must be established; operation of a motor vehicle. *Roberts v. Thigpen*, No. 82-4067, slip op. at 5 (5th Cir., Nov. 16, 1982).

Turning to the offense of manslaughter, the Court of Appeals had the following comments:

> Of course, to establish manslaughter, an element not required to prove reckless driving must be shown: death of a person. *Id.*, at 5.

However, the Court in discussing the foregoing made the following statement which in light of the ultimate ruling below is somewhat puzzling.

> A narrow focus on the two statutes provides one answer. Proof of manslaughter does not necessarily entail proof of reckless driving, for manslaughter could be proved in a situation completely foreign to vehicular collision. *Id.*, at 5.

Illinois v. Vitale, supra, involves strikingly similar facts. The respondent's automobile struck and killed two (2) children. A police officer at the scene issued a traffic citation charging respondent with failing to reduce speed to avoid an accident. The respondent was convicted and fined, and the State then charged him with involuntary manslaughter under the statute involved in the present case. The Supreme Court of Illinois held that the second prosecution was barred by the Double Jeopardy Clause of the Constitution. Noting that "[t]he sole question before us is whether the offense of failing to reduce speed to avoid an accident is the 'same offense' for double jeopardy purposes as the manslaughter charges brought against Vitale," *Id.*, at 415-416, this Court held:

> The Blockburger test [*Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932)] focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial. Thus [in Brown v. Ohio, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)] we stated that if "each *statute* requires proof of an additional fact which the other does not," . . . the offenses are not the same under the Blockburger *test*. *Vitale, supra*, at 416, 65 L.Ed.2d 228, 100 S.Ct. 2260, quoting 432 U.S., at 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (emphasis supplied by *Vitale* court).

This principle was amplified by example. *Brown v. Ohio, supra*, depended on the fact that a prosecutor who has established the offense of "joy riding" need only prove the requisite intent in order to establish auto theft, and " 'the prosecutor who has established auto theft necessarily has established joy riding as well.' " *Vitale, supra*, at 417, 65 L.Ed.2d 228, 100 S.Ct. 2260, quoting *Brown*, 432 U.S., at 168, 53 L.Ed.2d 187, 97 S.Ct. 2221. If proof of auto theft had not necessarily involved proof of joy riding, "the successive prosecutions would not have been for the 'same offense' within the meaning of the double jeopardy clause." 447 U.S., at 417, 65 L.Ed.2d 228, 100 S.Ct. 2260. The Court concluded, in a holding directly controlling in the case at bar:

> [I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. *Id.*, at 419, 65 L.Ed.2d 228, 100 S.Ct. 2260.

At this juncture, petitioners suggest, the Court of Appeals erred. Instead of relying strictly upon this Court's directive in *Blockburger* that there must necessarily be an overlay of the statutory elements, both the District Court and the Court of Appeals looked to the actual evidence that had to be presented at both trials and concluded therefrom that a Double Jeopardy violation had occurred. In particular the Court of Appeals held:

> It is unnecessary to resolve this dilemma on the first prong of the analysis. Roberts unquestionably has such a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.
>
> The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter, Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Roberts' conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter. (footnotes omitted)

Roberts v. Thigpen, supra, at 6-9.

The ruling in this case is quite confusing when compared to the holding in the case of *United States v. Cowart,* 595 F.2d 1023 (5th Cir. 1979). In discussing principally the same topic, the method by which determines whether two charges are the "same offense," the Court summarized the ruling thusly:

To determine whether defendant was subject to multiple punishment for the same offense, we look to the leading case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), where the Supreme Court of the United States formulated the applicable standard.

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test of [sic] be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182. *See also Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *Jeffers v. United States*, 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977).

This standard frequently has been referred to as the "same evidence" test; however, the *Blockburger* test looks *not* to the evidence adduced at trial but focuses on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (*Blockburger* test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."); *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [*Blockburger*] test focuses on the statutory elements of the offenses charged."). An examination of the elements of the respective offenses of "conspiracy" and "aiding and

abetting" demonstrates that Cowart was convicted of two, separate and distinguishable offenses.

Id., at 1029-30.

Cf., Ciucci v. Illinois, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958).

While there is little doubt that the evidence necessary to prove the charge of reckless driving was introduced to establish the second offense of manslaughter, such does not preclude the State of Mississippi prosecuting respondent on a charge of manslaughter or enforcing its judgment after conviction thereon.

An examination of the statutory offenses here involved reveals that each contains elements not common to the other. The offense of reckless driving is predicated upon the manner of operation of a motor vehicle and is in no manner dependent upon any resultant injury to persons or property. *See*: *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (Miss. 1979). *See also*: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). Consequently, there is an obvious lack of mutuality between the two offenses.

The cases decided by this Court are replete with the admonition that the lower courts, both State and Federal, are to look to the *statutory* elements of the first and second charges and not to the similarities or overlap of facts between the two cases. E.g., *Vitale, supra; Brown, supra; Iannelli v. United States*, 420 U.S. 770, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975). Otherwise, there is no reason why

the offenses of driving under the influence of intoxicating liquor, driving on the wrong side of the highway, and driving while one's license has been revoked would not fall within the same category. *Cf., Cutshall v. State,* 191 Miss. 764, 4 So.2d 289 (1941); *Scott v. State,* 183 Miss. 738, 185 So. 195 (1938); *Goudy v. State,* 203 Miss. 366, 35 So. 308 (1948).

Within the parameters of the instant matter one must recognize that there is a possibility that the State may on occasion seek to rely upon all of the ingredients necessarily included in the offense of reckless driving under Miss. Code Anno. § 63-3-1201 (1972) to establish an element in a case of manslaughter. However, such is not sufficient to preclude the prosecution of the latter. Inasmuch as each offense requires proof of an element not required in the other, they obviously do not meet the "same offense" or *Blockburger* test and, therefore, do not raise a substantial claim of double jeopardy.

CONCLUSION

In the final analysis respondent's claim of double jeopardy must fail under the line of authority cited herein. One cannot down play the role of a right to a trial *de novo* in an appeal from the justice court to the circuit court. As indicated *infra,* a right to trial *de novo* vacates or voids the previous conviction in the justice court, and the defendant stands before the appellate court clothed with a presumption of innocence. Consequently, when a defendant exercises his right to appeal, his previous conviction and sentence are rendered void and jeopardy has not attached.

Within this context one finds a compound flaw in the judgment of the Court of Appeals. Initially, if petitioner by appealing and affording himself of a right to trial *de novo*

voided his previous conviction of reckless driving and thereby vitiated his claims of double jeopardy, one must conclude that he was not subjected to double jeopardy in his trial in the Circuit Court since the State during the course of the proceedings dismissed all of the misdemeanor charges.

Alternatively, the Court of Appeals erred in applying the *Blockburger* test by looking not to the elements necessary to prove each charge but instead to the evidence actually admitted. Without question the same evidence would have been admitted at both trials since the two charges arose out of the same facts and circumstances. However, as demonstrated previously, there is a clear lack of mutuality between the elements of the two. Consequently, the finding of a "substantial claim of double jeopardy" must fail.

For these reasons, we ask the Court to reverse and remand the matter *sub judice*.

Respectfully submitted,

BILL ALLAIN, Attorney General
State of Mississippi
WILLIAM S. BOYD, III
Special Assistant Attorney General

By: /s/ WILLIAM S. BOYD, III
WILLIAM S. BOYD, III

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, and one of the attorneys for Petitioners, do hereby certify that I have this day caused to be served three (3) true and correct copies of the foregoing Brief for the Petitioners to the following:

Cleve McDowell, Esquire
Attorney at Law
Post Office Box 1205
Cleveland, Mississippi 38732
Attorney for Respondent

This, the 6th day of September, 1983.

/s/ WILLIAM S. BOYD, III
WILLIAM S. BOYD, III